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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY, *Petitioner,*

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief of the Lawyers' Committee for Civil Rights Under Law *Amicus Curiae* in Support of the Decision Below

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AMICUS CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

INTEREST OF THE *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States, John F. Kennedy, to involve

private attorneys throughout the country in the national effort to assure equal civil rights for all Americans. The Committee's membership today includes three former Attorneys General, eleven past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D. C. and its offices in Jackson, Mississippi and twelve other cities, the Lawyers' Committee over the past eleven years has enlisted the services of over a thousand members of the private Bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, and the administration of justice.

The primary objective of the Lawyers' Committee is to help develop the legal resources necessary to enforce fully the civil rights of minorities and the poor. Through the efforts of the Lawyers' Committee and similar groups, a great deal of high-quality legal service has been provided by the volunteer activities of the private Bar. However, the experience of the Lawyers' Committee over the past decade compels the conclusion that these valuable but limited legal resources are inadequate by themselves to effectuate fully the basic civil rights created by Congress and embodied in the Constitution. A growing number of federal courts has reached this same conclusion. Accordingly, these courts have determined that an award of attorneys' fees to "private attorneys general" is an essential element of the relief appropriate for those who have vindicated basic rights which depend in large measure upon private enforcement.

This principle is now before this Court in the instant case. The Lawyers' Committee believes that the

issues raised in this appeal are crucial to the objective of full civil rights enforcement and therefore files this brief as *amicus curiae*, first, to trace the development of principles relating to the awarding of attorneys' fees in civil rights cases, and second, to show their relevance in this case. The written consent of the parties, pursuant to Rule 42(2), Rules of the Supreme Court of the United States, is filed herewith.

SUMMARY OF ARGUMENT

It is unquestionably true that federal courts have the authority to award attorneys' fees as an appropriate element of equitable relief. Until recently, the federal courts have exercised this equitable power most frequently either where the party upon whom the fees are imposed has conducted the litigation in "bad faith" or where the successful litigant has in effect conferred a benefit upon the party compelled to pay.

However, a third equitable consideration has emerged in cases where private litigants have shouldered the heavy burden of enforcing basic rights of national importance, often with little or no prospect of financial recovery. In such cases, many lower courts have substantially expanded the boundaries of the traditional fee shifting doctrines to allow for fee recoveries by such litigants. Growing numbers of federal courts have explicitly recognized this equitable consideration as a distinct and independently sufficient ground, awarding fees to litigants who have acted as such "private attorneys general." Although this Court has never explicitly adopted this doctrine, it has recognized the strength of its underlying rationale—the necessity of such a recovery to effectuate basic substantive rights created by Congress or embodied in the Constitution.

The "private attorney general" doctrine rests firmly upon the historic responsibility of federal courts to fashion an effective remedy for federal rights. Where basic civil rights such as those against racial segregation and discrimination are substantially dependent upon private enforcement, the realization of those rights can become an illusory promise if adequate legal resources are not available to correct their abridgement. Although a significant commitment has been undertaken over the years by the private Bar to provide such resources with little or no compensation, the ability of the private Bar to absorb these often complex, protracted and expensive non-paying matters is limited. The enforcement of basic rights should not be left to rest upon such fortuitous resources.

The discretion of courts of first instance, in this case the Court of Appeals, in awarding attorneys' fees is necessarily broad since the essential considerations of fairness and necessity are best determined by the court which has determined the merits of the case. The Court of Appeals did not abuse its discretion in this case in finding that respondents have acted as "private attorneys general" vindicating strong national policies and conferring substantial benefits upon the entire nation. The Court of Appeals correctly assessed the "success" of the respondents on the basis of what the litigation accomplished in fact. Similarly, the Court of Appeals was correct in rejecting the contention, here pressed by petitioner, that the amount of the fees recoverable should vary depending upon whether the attorney involved engages in such *pro bono publico* litigation as a part of his regular private practice or as a staff attorney for a non-profit litigating organization. The Court of Appeals applied the fair and workable principle that fee awards, where

appropriate, should be based upon the reasonable value of the attorney's services. Finally, the Court of Appeals did not abuse its discretion in finding that, under the particular facts of this case, an award of attorneys' fees against this petitioner was reasonable.

ARGUMENT

I. FEDERAL COURTS HAVE THE EQUITABLE POWER TO AWARD ATTORNEYS' FEES TO "PRIVATE ATTORNEYS GENERAL" WHO HAVE ENFORCED STRONG NATIONAL POLICIES THEREBY CONFERRING SUBSTANTIAL BENEFIT ON A LARGE SEGMENT OF THE PUBLIC.

The long-standing American rule that private litigants bear the costs of the attorneys they retain to prosecute or defend their legal rights remains the practice in the vast bulk of legal disputes.[1] However, it is just as firmly established that "[a]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts." *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161, 164 (1939). "[T]he current of authority is uniform and unequivocal." *Id.* at 165 n.2.[2]

In a growing number of statutes, Congress has specifically indicated that suits arising thereunder are appropriate situations for the exercise of judicial discretion to award attorneys' fees.[3] Moreover, a number

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[1] *See F. D. Rich Co.* v. *United States, ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974).

[2] *See also Trustees* v. *Greenough*, 105 U.S. 527, 536 (1881); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 392-393 (1970). Indeed petitioner concedes the existence of such equitable power on the part of federal courts. *Brief for the Petitioner* at 13.

[3] Some statutory attorneys' fees provisions are mandatory in their operation, thereby withdrawing the courts' discretion. *See, e.g.*, 7 U.S.C. § 210(f) (Packers and Stockyards Act of 1921); 7 U.S.C. § 499g(b) (Perishable Agricultural Commodities Act of 1930); 45 U.S.C. § 153(p) (Railway Labor Act of 1926); 49

of courts, in cases arising under statutes which do not provide for an award of attorneys' fees, have looked to closely related statutes that contain fee award provisions and have drawn from these statutory analogies support for the exercise of their equitable powers. Thus, in *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), a suit under the Civil Rights Act of 1866, 42 U.S.C. § 1982, challenging discrimination in the sale of real estate, the court looked to the provision for attorneys' fees in the Fair Housing Act of 1968, 42 U.S.C. § 3612(c), a statute which embodies policies substantially similar to those involved in *Lee*. In awarding attorneys' fees to the plaintiffs the court stated:

> [I]n fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. [444 F.2d at 146.]

Similarly, many courts which have awarded attorneys' fees in employment discrimination cases arising under 42 U.S.C. §§ 1981 and 1983 have found support for the exercise of their equitable power from the statutory

U.S.C. § 16(2) (Interstate Commerce Act of 1887). However, a larger number of statutory attorneys' fees provisions—particularly those relating to cases involving a broad public interest—simply authorize federal courts to exercise their discretion to award fees, a discretion this Court has indicated should be exercised in favor of fee awards. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). *See, e.g.*, 42 U.S.C. § 2000a-3(b) (Civil Rights Act of 1964, Title II); 42 U.S.C. § 2000e-5(k) (Civil Rights Act of 1964, Title VII); 42 U.S.C. § 3612(c) (Fair Housing Act of 1968, § 812); 20 U.S.C. § 1617 (Emergency School Aid Act of 1972, § 718); 29 U.S.C. § 501(b) (Labor-Management Reporting and Disclosure Act of 1959, § 102); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act Amendments of 1974, § 4e); 5 U.S.C. § 552(g)(2)(B) (Privacy Act of 1974, § 2(g)(2)(B)).

provision for fee awards in Title VII of the Civil Rights Act of 1964.[4]

Even in the absence of any legislative provision for fee awards—either explicit or implied—the federal courts have recognized several limited, but nonetheless vital, situations in which an award of attorneys' fees is necessary to assure "equity and justice."[5] Until recently, the most prominent of these judicially created exceptions involved two types of cases: first, where the party upon whom the fees were imposed had acted "in bad faith;" or second, where the plaintiff has succeeded in creating a "common fund" for the benefit of

[4] *See Cooper* v. *Allen*, 467 F.2d 836 (5th Cir. 1972); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974); *Harper* v. *Mayor & City Council of Baltimore*, 359 F. Supp. 1187 (D. Md.), *aff'd*, 486 F.2d 1134 (4th Cir. 1973). *Cf. Northcross* v. *Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973).

[5] *Trustees* v. *Greenough*, *supra*, 105 U.S. at 536. Certainly, courts cannot exercise their equitable power to award fees in the face of legislative enactments precluding them. Thus, in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 719 (1967), this Court found such a prohibition in the "meticulously detailed" scheme of remedies provided by Congress in the Lanham Act, 15 U.S.C. §§ 1051-1127, under which the case arose. However, in *Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 390-391, the Court made clear that the mere absence of specific statutory authorization for fee awards does not preclude a court from awarding them, even where other provisions of the Act under which suit is brought do provide for fees. *See also Hall* v. *Cole*, 412 U.S. 1, 9-11 (1973). As the Court stated in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946):

> [T]he comprehensiveness of * * * equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

others and thus a shift in the fees merely served to impose them on the real beneficiaries of the lawsuit. However, courts have steadily expanded the boundaries of the "bad faith" and "common fund" doctrines to accommodate a third overriding equitable consideration—the effectuation of basic national policies that are significantly dependent upon private enforcement. Many courts have explicitly recognized this as an additional and distinct rationale for awarding attorneys' fees (*see* pp. 15-16, *infra*).

The "bad faith" principle for shifting the costs of attorneys' fees is based upon the wrongdoing of the party compelled to pay and is punitive in purpose.[6] Courts have applied this rationale against a party who has acted "vexatiously, wantonly, or for oppressive reasons."[7] However, particularly in cases enforcing the basic national goal of desegregation, many courts have found "bad faith" in far less egregious conduct. For example, in *Cato* v. *Parham*, 293 F. Supp. 1375 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968), the court, although it specifically "[did] not impugn the Board's good faith in trying to carry out the mandate of the *Brown* decisions, as the Board understood that mandate," nonetheless justified an award of attorneys' fees on what might be called a "quasi-bad faith" rationale:

> [I]t cannot be gainsaid that whatever progress has been made in the direction of desegregation at Dollarway has followed judicial prodding. [293 F. Supp. at 1378.[8]]

[6] *Hall* v. *Cole*, *supra*, 412 U.S. at 5.

[7] 6 J. Moore, *Federal Practice* ¶ 54.77[2], at 1709 (2d ed. 1972).

[8] *See also Bell* v. *School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963) (*en banc*); *Rolfe* v. *County Bd. of Educ.*, 282 F. Supp. 192 (E.D. Tenn. 1966), *aff'd*, 391 F.2d 77 (6th Cir. 1968).

This same impulse to expand the familiar grounds for fee shifting in situations where private litigants have enforced basic national policies and benefited an important public interest is apparent from an examination of the development of the second major equitable doctrine under which courts award attorneys' fees —the "common fund" rationale. The earliest applications of the "common fund" principle involved cases where a litigant had, by the prosecution of his lawsuit, created a monetary fund on behalf of others as well as himself. *See, e.g., Trustees* v. *Greenough, supra.* The courts reasoned that it simply would be unfair to permit others to enjoy the benefits of the plaintiff's efforts without also imposing upon them their share of the costs associated with the achievement of those benefits. *Trustees* v. *Greenough, supra,* 105 U.S. at 532. However, like the "bad faith" rationale, the dimensions of the "common fund" doctrine have been substantially expanded to accommodate additional equitable considerations. In *Sprague* v. *Ticonic Nat. Bank, supra,* the Court held that the "common fund" rationale for fee shifting does not depend upon the existence of a formal class on whose behalf plaintiff sued or upon the actual creation of a "fund." Plaintiff had succeeded in establishing a lien on the proceeds of bonds that had been earmarked as security for her trust deposit with defendant bank. The Court noted:

> [W]hen such a fund is for all practical purposes created for the benefit of others [fourteen other trusts tied to the same bonds], the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. [307 U.S. at 167.]

The "common fund" doctrine became a "common benefit" doctrine with *Mills* v. *Electric Auto-Lite Co., supra.* Plaintiffs, minority shareholders of Auto-Lite, had succeeded in establishing that "proxies necessary to approval of the merger [of its company into another] were obtained by means of a materially misleading solicitation" in violation of the proxy provisions of the Securities and Exchange Act of 1934. 396 U.S. at 386. Notwithstanding the fact that the "benefit" conferred upon the shareholders by the lawsuit was non-pecuniary in nature, the Court held that:

> [P]etitioners have rendered a substantial service to the corporation and its shareholders. * * * To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class who has benefited from them and that would have had to pay them had it brought the suit. [*Id.* at 396-397.[9]]

Although the "common benefit" doctrine which evolved out of *Sprague* and *Mills* generally has been understood to rest solely upon an "unjust enrichment" principle,[10] *i.e.*, that those who benefit from the lawsuit

[9] *See also Hall* v. *Cole, supra*, where this Court applied the same rationale for fee shifting in a suit by a member against his union for violation of his right to free speech protected by § 102 of the Labor-Management Reporting and Disclosure Act of 1959. Respondent "necessarily rendered a substantial service to his union as an institution and all of its members." 412 U.S. at 8.

[10] *See, e.g., F. D. Rich Co.* v. *Industrial Lumber Co., supra*, 417 U.S. at 129–30, wherein the Court stated that one of the recognized exceptions to the general rule is "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class." *See also Hall* v. *Cole, supra*, 412 U.S. at 5–6. Indeed, the Court of Appeals in the instant case rejected the "common benefit" rationale because "imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries, the key requirement of the 'common benefit' theory." *Wilderness Society* v. *Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974) [hereinafter cited as *Wilderness Society II*].

should share proportionately in its costs, it is important to recognize that the costs of the lawsuit in *Mills* were imposed in part upon those who were not beneficiaries of the plaintiffs' efforts, except as the public generally benefited. The Court explicitly stated that the burden of the attorney fee award could be imposed upon the successor corporation,[11] notwithstanding the fact that the only benefit to the pre-existing shareholders of the acquiring company was the general benefit to all shareholders everywhere from the enforcement of honest corporate suffrage.[12] It is apparent that equitable considerations broader than simply "unjust enrichment" were involved in the fee award in *Mills.* The case is better understood as also resting heavily upon the Court's recognition that the equity power to award fees should be exercised to help effectuate the strong Congressional policy of "fair

[11] *Mills* v. *Electric Auto-Lite Co., supra*, 396 U.S. at 390.

[12] Similarly, in *Sprague*, the costs of the lawsuit were imposed in part upon those who not only were not beneficiaries but who were affected adversely by the litigation. Liability for the fees in *Sprague* fell upon the defendant bank which was in receivership. *See Sprague* v. *Picher*, 23 F. Supp. 59 (D. Me. 1938). However, by establishing a priority claim to the proceeds of the previously sold bonds on behalf of herself and her fourteen fellow trust depositors, plaintiff not only failed to benefit the bank's shareholders or its unsecured depositors but established a right that was adverse to their interests. The Court was aware of this consideration, *Sprague* v. *Ticonic Nat. Bank, supra*, 307 U.S. at 167, but apparently felt that there could be overriding equitable factors that would nonetheless warrant a fee award.

and informed corporate suffrage." As the Court stated:

> [T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its stockholders. * * * [P]rivate stockholders' actions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. [396 U.S. at 396; footnotes omitted.[13]]

As *Mills* demonstrates, much of the impulse to extend the traditional rationales for fee awards has come from the judicial perception that it is both appropriate and necessary for courts to exercise their equitable power to award fees in a third, often related, but nonetheless distinct situation, namely, where strong national policies would not be fully enforced if private

[13] Similarly, in *Hall* v. *Cole*, *supra*, although the Court rested its decision on what was essentially a "common benefit" theory, the benefit conferred by the plaintiffs' enforcement of the union democracy policies of the Labor-Management Reporting and Disclosure Act of 1959, § 102, redounded equally to all union members, not merely to those of the defendant union. That the Court was concerned, not merely with "unjust enrichment" to the members of the defendant union, but also with the desirability of attorney fee awards to help effectuate the strong policies of the Act is apparent from its citation, with approval, of the language of *Gartner* v. *Soloner*, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968). That case involved the same statute and adopted the "private attorney general" rationale. This Court noted:

> [I]t is simply "untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the inescapable fact that an aggrieved union member would be unable to finance litigation. . . ." *Gartner* v. *Soloner*, *supra*, at 355. [*Hall* v. *Cole*, *supra*, 412 U.S. at 13-14.]

litigants were forced to bear the costs of enforcement. This consideration at times co-exists with "bad faith" on the part of the other party; in other instances, the party upon whom the costs are imposed is indeed the true beneficiary of the lawsuit. However, circumstances enabling courts to rely upon the "bad faith" and "common benefit" doctrines are not always present.[14]

In *Newman* v. *Piggie Park Enterprises*, *supra*, this Court recognized the strength of the enforcement-

[14] For example, although in some situations a "common benefit" rationale can appropriately be applied in a suit to enforce a strong national policy against a public agency, *see*, *e.g.*, *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973), and this Court has recently implied its support for such a rationale, *Bradley* v. *School Bd.*, 416 U.S. 696, 718 (1974), in many situations it is conceptually difficult to explain a fee award against a public agency as merely a proportionate shift of the costs of the litigation to its beneficiaries. Thus, in *LaRaza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), the "most immediate impact" of the suit was on the 5,000 residents whose homes were saved by enjoining the proposed highway; "substantial benefits" were conferred upon the 200,000 area residents whose parks were saved; and the suit had a "very real impact" on the entire Bay Area which was protected against undue housing and environmental problems in connection with the highway project. Under these circumstances, shifting the fees onto the defendant public agencies could not result in the beneficiaries paying their proportionate share. Even in *Bradley*, the district judge, in rejecting a "common benefit" rationale, pointed out that "to say that the plaintiff class will actually in effect pay their attorneys if the School Board is made to pay counsel fees entails a number of unproved assumptions about the extent to which pupils pay for their free public schooling." *Bradley* v. *School Bd.*, 53 F.R.D. 28, 35-36 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 696 (1974). The more realistic view, and that adopted by many of the lower courts, *see infra*, is that a fee award to plaintiffs in suits against public agencies is justified in appropriate circumstances on the basis of the "private attorney general" rationale.

necessity rationale, although not adopting it explicitly. Although the case arose under a statute in which Congress had indicated that the exercise of judicial discretion to award fees was appropriate, the Court, in setting forth the manner in which that discretion should be exercised, stressed the necessity of fee awards to effectuate the vital national policy of non-discrimination in public accommodations.

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.
>
> * * *
>
> It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. [390 U.S. at 401-402; footnotes omitted.]

Encouraged by the strongly suggestive authority of this Court and unwilling to distort the "bad faith" and "common fund" doctrines beyond recognition, a steady stream of lower courts has explicitly recognized the "private attorney general" principle, awarding attorneys' fees to plaintiffs who have enforced strong national policies and conferred broad public benefit.

Indeed, the availability of attorney fee awards, particularly in suits to enforce the bedrock national policies against racial segregation and discriminaton, has been a major factor in the dramatic progress that has been achieved toward those ends in the past decade. That the courts have increasingly replaced the streets as the arena for resolving the grievances arising from generations of racial discrimination can be directly traced to the landmark declarations of fundamental civil rights by the Congress and the willingness of the federal courts to use their inherent powers to shape realistic remedies for the violation of those rights. These courts have recognized that the full realization of basic rights created by Congress or embodied in the Constitution often depends upon the enforcement efforts of private litigants and that, as a practical matter, the costs of such private enforcement are frequently prohibitive. In these circumstances, growing numbers of courts have ruled that an award of attorneys' fees is an essential element of the remedy for a violation of these rights and is necessary to give them real meaning.

Thus, courts have recognized a "private attorney general" rationale for awarding attorneys' fees in the absence of specific Congressional authorization in suits to enforce: the right to free and equal suffrage, *Sims* v. *Amos*, 336 F. Supp. 924, 340 F. Supp. 691 (M.D. Ala.), *aff'd per curiam*, 409 U.S. 942 (1972);[15] the right to non-discrimination in employment, *Cooper* v. *Allen, supra; NAACP* v. *Allen, supra,* in the rental of housing, *Knight* v. *Auciello,* 453 F.2d 852 (1st Cir. 1972); *Brown* v. *Ballas,* 331 F. Supp. 1033 (N.D. Tex.

[15] Indeed, "[a]wards of attorneys' fees in reapportionment cases have become a matter of course." *Briscoe* v. *Jefferson Davis Parish Policy Jury*, No. 17,392 (W.D. La., Sept. 2, 1972).

1971), in the sale of real estate, *Lee* v. *Southern Home Sites, supra,* and in the selection of juries, *Ford* v. *White,* No. 1230(N) (S.D. Miss., Aug. 3, 1972); and the right to desegregated public education, *Bradley* v. *School Bd., supra,* 53 F.R.D. 28, and public housing, *Taylor* v. *City of Millington,* No. 71-249 (W.D. Tenn., Apr. 25, 1972), *aff'd,* 476 F.2d 599 (6th Cir. 1973).

Similarly, in appropriate circumstances courts have recognized the enforcement-necessity rationale for awarding attorneys' fees to private litigants who have vindicated other basic statutory and constitutional rights not involving racial discrimination, including: the right of involuntarily committed mentally retarded and mentally ill patients to adequate treatment, *Wyatt* v. *Stickney,* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt,* No. 72-2634 (5th Cir., Nov. 8, 1974); the constitutional rights of prisoners, *Incarcerated Men of Allen Cy.* v. *Fair,* No. 74-1052 (6th Cir., Nov. 13, 1974); the right to free speech under the First Amendment, *Stolberg* v. *Members of the Bd. of Trustees,* 474 F.2d 485 (2d Cir. 1973); the right against unreasonable searches under the Fourth Amendment, *Stanford Daily* v. *Zurcher,* 366 F. Supp. 18 (N.D. Cal. 1973); the fundamental rights of union members created by the Labor-Management Reporting and Disclosure Act, including the right to fair and democratic elections, *Yablonski* v. *United Mine Workers,* 466 F.2d 424 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 918 (1973); *Gartner* v. *Soloner, supra;* and the rights to environmental protection created by Congress, *Natural Resources Defense Council* v. *E.P.A.,* 484 F.2d 1331 (1st Cir. 1973); *LaRaza Unida* v. *Volpe, supra.*

The awarding of attorneys' fees where necessary to effectuate substantive rights created by Congress or

the Constitution rests firmly upon the long-established principle that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies,"[16] and that in the absence of a "clear command" of Congress to the contrary,[17] courts should fashion "an effective equitable remedy."[18] As this Court stated in *Bell* v. *Hood,* 327 U.S. 678 (1946):

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such an invasion, federal courts may use any available remedy to make good the wrong done. [*Id.* at 684; footnotes omitted.[19]]

Moreover, this Court held in *Virginia Ry.* v. *System Federation,* 300 U.S. 515, 552 (1937), that those equitable powers assume an even broader and more flexible character where a public interest, and not merely a private controversy, is at stake.

The "private attorney general" doctrine is based squarely upon this historic equitable foundation. It has been applied most frequently where important

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[16] *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 239 (1969).

[17] *Porter* v. *Warner Holding Co., supra,* 328 U.S. at 398.

[18] *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 414 n.13 (1968).

[19] *See also Mitchell* v. *DeMario Jewelry, Inc.,* 361 U.S. 288, 291-292 (1960):

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature." *Clark* v. *Smith,* 13 Pet. 195, 203.

rights created by Congress or the Constitution rely heavily upon private enforcement and where such private enforcement is impractical in the absence of a fee award since the costs of such enforcement overwhelm any potential monetary recovery.

The strong national policies against racial segregation and discrimination, for example, which spring from the Constitution and have been given structure by the Congress, have been given life largely through private enforcement. As one commentator stated:

> Although considerable efforts have been channeled through * * * public instrumentalities, the inherent limitations of restricted funding, heavily centralized bureaucratic organization and, in many instances, direct conflicts of interest, have substantially impaired their overall effectiveness. [[20]]

As noted by Judge Winter, concurring in *Brewer* v. *School Bd.*, 456 F.2d 943 (4th Cir.), *cert. denied*, 409 U.S. 892 (1972):

> Despite the extensive enforcement responsibilities the [civil rights] statutes place on the Departments of Justice and Health, Education and Welfare and their immense resources, we know from the cases which come before us that they have been unable to shoulder the entire burden of litigation to make *Brown I* fully effective. * * * Almost all of the burden of litigation has been upon the aggrieved plaintiffs and those non-profit organizations which have provided them with representation. [456 F.2d at 954.[21]]

[20] Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 Hast. L. Rev. 733 (1973).

[21] In fact, notwithstanding the "immense resources" of these Departments overall, the entire budget of the Department of Justice's Civil Rights Division for education activities in one typical recent year was only $1 million. S. Rep. No. 92-61, 92d Cong., 1st Sess., at 25 (1971). This Court has often noted the pivotal role of private enforcement in effectuating the nation's civil rights laws. *See, e.g., Newman* v. *Piggie Park Enterprises, supra*, 390 U.S. at 402.

But while it is generally acknowledged that the implementation of the civil rights laws, an objective of fundamental importance to every American, depends upon the private enforcement efforts of those aggrieved, the economics of such enforcement in the absence of fee awards frequently pose impossible barriers. Damages are often not recoverable as a legal [22] or practical [23] matter. For example, in reapportionment and desegregation suits brought under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1983, the only relief frequently available is injunctive. And even where a monetary recovery is possible, it is often insubstantial when measured against the awesome costs of recovery.[24] For one fact has become incontrovertibly clear over the past two decades: the legal road to civil rights enforcement is often long and arduous. The legal and factual path is often uncharted, and the political, social and emotional stakes are high.

Plaintiffs' efforts to vindicate their basic right to a desegregated jury system in Marengo County, Alabama, for example, extended over nine years.[25] It took seven years to vindicate the rights of black children in Petersburg, Virginia, to a desegregated public edu-

[22] *See, e.g.*, Title II, Civil Rights Act of 1974, 42 U.S.C. § 2000 a-3(b).

[23] *See, e.g., Lee* v. *Southern Home Sites, supra; Cooper* v. *Allen, supra.*

[24] *See, e.g., Knight* v. *Auciello, supra; Hill* v. *Franklin Cy. Bd. of Educ.*, 390 F.2d 583 (6th Cir. 1968).

[25] *Jones* v. *Holliman*, No. 3944-65 (S.D. Ala., July 9, 1973).

cation.[26] And the costs of *Brown* itself have been estimated at $200,000.[27] When measured against the limited means of those aggrieved, these obstacles are not only imposing, they are often insurmountable. As pointed out by the district judge in *Bradley* v. *School Bd.*, *supra:*

> [T]his sort of case [school desegregation] is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts. [53 F.R.D. at 40.]

Under these circumstances, the availability of a recovery of attorneys' fees becomes not merely an equitable remedy, but one that is necessary to avoid "repealing the Act itself by frustrating its basic purpose." [28]

[26] *Cole* v. *School Bd.*, No. 4476-R (E.D. Va., Aug. 10, 1972).

[27] 110 Cong. Rec. 6541 (1964).

[28] *Cole* v. *Hall*, 462 F.2d 777, 780, *aff'd*, 412 U.S. 1 (1973). The Court of Appeals for the Second Circuit in that case, which involved the vindication of the congressionally created civil rights of union members, went on to say: "[w]ithout counsel fees the grant of federal jurisdiction is but a gesture for few union members would avail themselves of it." 462 F.2d at 781. *See also LaRaza Unida* v. *Volpe*, *supra*, in which the District Court stated:

> [T]hese exhortations toward citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expense rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle. [57 F.R.D. at 101; footnote omitted.]

That substantial progress has been made over the recent past in securing the basic civil rights of all Americans by no means impels the conclusion that fee awards are not necessary. Indeed, in those areas which have experienced the greatest advances—for example, desegregation of public schools and reapportionment—fee awards by the lower courts to private litigants who have enforced these basic rights have become the general practice, justified either explicitly on an enforcement-necessity basis or, in some cases, on rather tortured extensions of the "bad faith" and "common benefit" principles. The realization of those rights and the evolution of this remedy have been inextricably intertwined.

In those areas where the right to recover attorneys' fees upon vindication of basic rights is less certain, it is noteworthy that many important cases have been brought. In these cases, legal representation was provided by public-minded private lawyers who were willing to undertake such cases without promise of compensation. Indeed, it has been an essential purpose of *Amicus* Lawyers' Committee for Civil Rights to enlist the services of the private Bar in such "public interest" litigation. Growing numbers of lawyers and law firms are undertaking such legal activities. It is no reflection upon them or their colleagues at the Bar, however, to acknowledge the blunt fact, inescapable from our experience over ten years, that the number

of nonpaying cases that can be absorbed in this way is only a minute fraction of those that must be brought.

It is obviously impossible to enumerate rights not vindicated and suits unbrought. However, it seems clear that the enforcement of fundamental rights should not be dependent upon the momentary supply of attorneys willing to undertake the substantial financial and professional sacrifices involved in such representation, or upon the limited and uncertain resources of a relative handful of organizations dedicated to such litigation. The right of a black child to an integrated education, or of a citizen to an equal vote, or of a mental patient to adequate medical treatment should hardly rest upon the fortuity of finding a lawyer willing to donate his professional skills. No more should it depend upon the success of last year's fund-raising effort by a non-profit litigating organization or the availability of lawyers willing to forgo the more lucrative pursuits of their profession to work for such groups. Certainly, the historical willingness of the private Bar to devote a portion of its professional resources to the representation of impecunious persons and non-pecuniary causes has been, and hopefully will continue to be, a vital hallmark of our profession. But fundamental human rights cannot be left to rest upon the charity of the Bar.

The fears commonly raised in objection to the "private attorney general" doctrine simply do not withstand close analysis. Recognition by this Court of the validity of this principle will not open the "floodgates" to litigation.[29] First, as has been previously noted, it is important to recognize that the Court has before it for

[29] *Wilderness Society II, supra*, dissent of Judge Wilkey, 495 F.2d at 1043.

consideration a doctrine that has been largely accepted by the lower courts. For this Court now to recognize the validity of the "private attorney general" doctrine would be generally to perpetuate the *status quo*, not to upset it. Second, by definition, an award of attorneys' fees under a "private attorney general" principle is only available where a private litigant succeeds in conferring a significant benefit on the nation generally or a large segment thereof. Under these circumstances, the prospect of a fee recovery can provide no additional incentive to the institution of frivolous or unmeritorious claims or those of purely private concern. Rather, to the extent that the recognition of such a principle does encourage litigation, it is litigation of a particularly worthy sort—well-conceived suits, likely of success, to enforce basic rights of general importance. Third, in many situations, eliminating the fortuity that those whose rights are about to be trammeled do not have the means to enforce them can only add a vital incentive for doing right—ultimate accountability in a court of law.

It has also been suggested that recognition of a "private attorney general" doctrine might deter the defense of lawsuits.[30] Two points should be noted. First, in many—perhaps most—cases in which the doctrine is involved, the stakes are sufficiently high for the defendant that a potential fee award against him will have no bearing at all on his decision to defend. That certainly has been the experience, for example, in the desegregation area where fee awards have been generally available from the lower courts. Second, the prospect of a fee award against a defendant will be

[30] *See Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra*, 386 U.S. at 718.

no disincentive where he believes he will win. To the extent that there is any possible disincentive effect, it could operate only where a defendant believes that there is a significant chance of losing. Thus, if there is any deterrent effect at all to the "private attorney general" doctrine, it is in effect an added incentive for defendants to settle smaller cases which plaintiffs are likely to win, a not totally undesirable result and certainly not one sufficient to override the substantial benefits flowing from such a doctrine.[31]

Finally, it has been suggested that adoption of the "private attorney general" doctrine will engage courts in the difficult job of deciding in what circumstances it applies[32] and will burden the courts with lengthy and costly determinations of proper fee awards.[33] However, application of the doctrine will proceed on a case-by-case basis, involving determinations of Congressional intent, fairness, and balances of interests not unfamiliar to the judicial process and frequently quite similar to the considerations involved in determining the merits of the case itself. In fact, the setting of reasonable fees is a task to which courts are growing increasingly accustomed, with no apparent difficulty.

[31] The concern expressed by the Court in *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* 386 U.S. at 718, that abandonment of the American rule entirely might discourage poor people from instituting suits to vindicate their rights if the penalty for losing included the fees of their opposing counsel, is not present under the "private attorney general" doctrine. As has been discussed above, fees are awarded under the doctrine to those who enforce strong national policies and confer broad public benefit. Successfully resisting such enforcement does not make one a "private attorney general," entitled to recover attorneys' fees.

[32] *Brief for the Petitioners* at 31.

[33] *See Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* 386 U.S. at 718.

As the Court noted in *F.D. Rich Co.* v. *United States, supra,* 417 U.S. at 129:

> [C]ourts have regularly engaged in that endeavor in the many contexts where fee shifting is mandated by statute, policy, or contract.

The "private attorney general" doctrine has been widely accepted by the lower courts. We strongly urge the Court now to recognize this essential principle, rooted firmly in our legal tradition and sustained by the equitable responsibility of courts to ensure justice.

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES TO RESPONDENTS IN THIS CASE

The scope of the discretion in the hands of courts of first instance in awarding attorneys' fees is necessarily broad. As this Court noted in *Trustees* v. *Greenough, supra,* 105 U.S. at 537:

> The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have.[34]

The award of attorneys' fees is an exercise in equity, calling upon the court of first instance, in this case the Court of Appeals, to weigh and balance considerations of fairness and necessity within the context of the particular facts of the case before it. Certainly the court that has heard and determined the merits of the

[34] *See also Ojeda* v. *Hackney,* 452 F.2d 947, 948 (5th Cir. 1972); *Dyer* v. *Love,* 307 F. Supp. 974, 985 (N.D. Miss. 1969), wherein the court said: "the allowance of an attorney fee is within the sound discretion of the Court, to be exercised on the peculiar facts of each case."

case to which fees relate is in the best position to strike that balance.

The Court of Appeals, which spent five months reviewing the massive and complex record in this case, did not abuse its discretionary authority in awarding fees to respondents. Respondents instituted this lawsuit to stop the "illegal" construction[35] of a 789-mile pipeline with massive impact upon the environment and upon the utilization of 641 miles of public lands, and to compel, as required by law, a full consideration of the environmental impact of this project including alternative allocations of these monumental public and private resources.[36] When this litigation was commenced, construction was about to be undertaken in violation of Congress' explicit exercise of its exclusive constitutional authority[37] to regulate the use of public lands, and without full compliance with the basic environmental safeguards established by the Congress in the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, *Wilderness Society* v. *Hickel*, 325 F. Supp. 422, 424 (D.D.C. 1970). Congress, which is charged by the Constitution with controlling the use of public lands, had established specific limitations upon their use for pipeline construction and had explicitly prohibited any construction that deviated from those limitations.[38] Notwithstanding that exercise—and corresponding reservation—of authority by Congress,

[35] *Wilderness Society* v. *Morton*, 479 F.2d 842, 891 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973) [hereinafter cited as *Wilderness Society I*.]

[36] *Id.* at 846, 849.

[37] U. S. Const., Article 4, § 3, Cl. 2.

[38] Mineral Leasing Act of 1920, § 28, 30 U.S.C. § 185 (1970).

petitioner was about to embark upon a utilization of a vast tract of public lands in a manner that significantly deviated from Congress' intent. Respondents brought suit in part to force petitioners "to go to Congress," which alone could authorize such a wholesale departure from the balance it had previously struck between public and private interests. Moreover, respondents instituted this action to prevent "the precipitous rush toward construction"[39] of the "most complex" and "most ecologically sensitive" engineering project ever attempted,[40] without full compliance with the essential safeguards embodied in NEPA.

Certainly the Court of Appeals was correct in finding that respondents, by their vigorous prosecution of this litigation, succeeded in conferring substantial benefits on every American. First, they forced petitioner to obtain the required Congressional approval for this multi-billion dollar project. In so doing, they enforced "the duty of the Executive Branch to observe the restrictions imposed by the Legislative."[41] For this was not a case involving an accommodation between Congress and the Executive at the hazy outer reaches of agency authority under a broad delegation of power. Here, the Executive was about to do precisely what Congress, in the exercise of responsibilities specifically conferred upon it by the Constitution, told the Executive it could not do.

Second, by forcing petitioner to seek Congressional approval, respondents effectuated the very policy envisioned by the Constitution in Article 4—that Congress

[39] Appellants' Memorandum in Support of Award of Expenses and Attorneys' Fees at 2, *Wilderness Society II*, *supra*.

[40] Statement of Undersecretary of the Interior William T. Pecora, contained in the Record below at P. Docs. III, Tab B, at 4.

[41] *Wilderness Society II*, *supra*, 495 F.2d at 1033.

would determine the proper balance between public and private interests in the utilization of our public lands. And when forced to reconsider the continued appropriateness of its previous judgments, Congress did far more than simply extend the width limitation of the pipeline right-of-way. It struck an entirely new balance between the sanctity and integrity of our public lands and the needs of this pipeline. As the Court of Appeals noted (*id.* at 1033), the amendments to the Mineral Leasing Act impose important new requirements on pipeline construction over public land, designed to protect the public interest. They include an end to the practice of permitting the free use of public land for such rights-of-way and require instead that the government receive "fair market value" for them; they empower the administering agency to assess against the right-of-way recipient all reasonable administrative costs of processing an application and of monitoring the right-of-way; and they impose upon the operator of a pipeline strict liability for damages resulting from use of the right-of-way and compel it to maintain a one hundred million dollar fund to satisfy any claim. "Forcing Alyeska to go to Congress to amend the 1920 Act certainly was not a sterile exercise in legal technicalities devoid of public significance." *Id.*

Third, the Court of Appeals found that respondents' "lawsuit and appeal served as a catalyst to ensure that the Department of the Interior drafted an impact statement [as required by NEPA] and that the statement was thorough and complete * * * [which] not only benefited the public's statutory right to have information about the environmental consequences of the pipeline * * * [but] also led to the refinement of environmentally protective stipulations placed as conditions on

the rights-of-way." *Id.* at 1034; footnote omitted. The benefit conferred upon the public by forcing petitioner and the government to rethink and refine their construction plans, *i.e.*, the benefit of a disaster averted, is inestimatable but immense. For as Hon. Russell E. Train, then Chairman of the President's Council on Environmental Quality and now Administrator of the Environmental Protection Agency, has acknowledged:

> The problems of constructing a pipeline across one of the most seismically active and remote areas of the world are * * * very real. These and other significant problems were simply not adequately faced in the initial proposal presented to the Department of Interior in 1969.
>
> If the pipeline had been constructed using the original design specifications, it would very likely have resulted in not only very serious environmental damage, but also serious operational problems. Indeed, the physical integrity of the pipeline itself was very much at stake.[42]

It is manifest that respondents indeed have acted as "private attorneys general," undertaking to enforce

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[42] Statement before the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973, quoted at *Wilderness Society II*, *supra*, 495 F.2d at 1033 n.3. Former Secretary of the Interior Hickel has been quoted to the same effect: "That first pipeline wouldn't have just been an environmental disaster. * * * It would have been a total engineering disaster." *New York Times*, May 26, 1974, § 1, at 34, col. 4.

Congress also acknowledged the important benefits that resulted from delay, in addition to those protections specifically adopted in the Mineral Leasing Act amendments:

> [T]he risk of environmental damage * * * has been substantially lessened as a result of the stricter environmental stipulations, redundant safety systems, contingency planning and better engineering imposed upon the proposed Trans Alaska pipeline. [S. Rep. No. 93-207, 93d Cong., 1st Sess., at 18 (1973).

Congressional and constitutional policies of national consequence and conferring substantial benefits upon us all.

In light of these results, it can hardly be dispositive, as petitioner contends,[43] that the respondents succeeded in the Court of Appeals on only one of two alternative grounds, the appellate court holding that it did not have to reach the other issue in light of its determination that the injunction sought by respondents should issue in any case. It would be totally inconsistent with the realities of complex litigation, and detrimental to the effective administration of justice, to compel courts to engage in a procrustean attempt to measure "success"—and, correspondingly, entitlement to a fee recovery—merely against the yardstick of the complaint. Recognizing this, the lower courts have awarded fees where plaintiffs have won some, but not all, of the relief they originally sought;[44] where defendants, after insti-

[43] *Brief for the Petitioner* at 32 *et seq.*

[44] *See, e.g., Clark* v. *Board of Educ.*, 449 F.2d 493 (8th Cir. 1971) (*en banc*), *cert. denied*, 405 U.S. 936 (1972); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970), *cert. denied*, 401 U.S. 911 (1971). *See also Hargrove* v. *Caddo Parish School Bd.*, No. 17,630 (W.D. La., June 13, 1972), where, notwithstanding the court's adoption of defendant school board's plan for reapportionment, it awarded attorneys' fees to plaintiff-intervenors, stating:

> [B]y their intervention and diligent efforts throughout these proceedings, [plaintiff-intervenors] have performed a service both to the Court and to the people of Caddo Parish. Plaintiff-intervenors, and the Court itself, raised the issue of the prohibition against dilution of black voting strength with which any redistricting plan must comply. Further, plaintiff-intervenors through the skill of their counsel and the use of an expert witness raised the level of accuracy of the "one-man, one-vote" mandate by demonstrating the statistical problems of employing voter registration data and made known to the Court as well as the Board the availability of block data, without which the Court-approved plan could not be designed.

tution of the lawsuit, have voluntarily changed the challenged practices;[45] where a consent decree was entered into without any stipulation of liability;[46] and where the parties have settled all, or some, of the issues raised by the plaintiff.[47]

Petitioner seeks an "objective" standard for measuring success: certainly the only realistic objective standard is what respondents have accomplished in fact. Any other formulation would merely serve needlessly to protract litigation, deter the raising of un-

[45] *See, e.g., Hammond* v. *Housing Authority & Urban Renewal Agency*, 328 F. Supp. 586 (D. Ore. 1971). *See also Yablonski* v. *United Mine Workers, supra*, wherein three of the four suits involved never went beyond the issuance of a preliminary injunction and the fourth was dismissed as moot when defendant union voluntarily adopted election rules conforming to plaintiff's requested reforms. In awarding fees in connection with all four cases, the Court of Appeals noted:

> It is not decisive in this instance that three of the suits never got beyond the issuance of preliminary injunctions, and the fourth failed even to do that. The fact is that in the former three cases the preliminary injunction was the critical step and procured all the relief required; and in the fourth case the very filing of the complaint and the holding of a hearing on the motion for a preliminary injunction effected a change of position by the defendants which warranted the court's conclusion that no mandatory order was necessary to achieve the plaintiff's aim. As all lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective. Assuming the effectiveness in terms of practical results, the litigating stage attained is relevant only to the amount of the fees to be allowed, and not to the issue of whether they should be awarded at all. [466 F.2d at 431; footnote omitted.]

[46] *See, e.g., Blumenthal* v. *Lee Memorial Hospital*, No. H-70-C-5 (E.D. Ark., Aug. 6, 1971); *Incarcerated Men of Allen Cy.* v. *Fair, supra.*

[47] *See, e.g., Webb* v. *Baxley*, No. 3564-N (M.D. Ala., Jan. 18, 1973).

tested legal issues, and inject totally artificial distortions into the conduct of litigation.

The Court of Appeals also did not abuse its discretion in holding that respondents' attorneys were appropriate recipients of an attorney fee award, or that the fee should represent "the reasonable value of the services rendered."[48] As the Court of Appeals for the Fifth Circuit noted in *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970):

> What is required is not an obligation to pay attorney fees. Rather what—and all—that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation. [*Id.* at 538-539; footnote omitted.]

In adopting the *Miller* holding, the Court of Appeals for the Ninth Circuit reasoned:

> The policy underlying the "private attorney general" doctrine supports this conclusion. It is true that the prospect of attorneys' fees does not discourage the litigant from bringing a suit when legal representation is provided without charge. But the entity providing the free legal services will be so discouraged, and an award of attorneys' fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay. Thus, an award of attorneys' fees to the organizations providing free legal services indirectly serves the same purpose as an award directly to a fee paying litigant. * * * [*Brandenburg* v. *Thompson*, 494 F.2d 885, 889 (9th Cir. 1974).[49]]

[48] *Wilderness Society II, supra*, 495 F.2d at 1036.

[49] This Court has, on several occasions, upheld an award of attorneys' fees to the NAACP Legal Defense and Education Fund, a non-profit litigating organization. *Newman* v. *Piggie Park Enterprises, supra; Northcross* v. *Memphis Bd. of Educ., supra; Bradley* v. *School Bd., supra.* Although those cases involved fee awards under statutes providing therefor, once it is determined that a fee award is appropriate under the courts' equity powers, there can be no basis for distinguishing between statutory and non-statutory cases in awarding fees to non-profit litigating groups.

See also Clark v. *American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971), where the court, in awarding attorneys' fees to plaintiff who was represented largely by the NAACP Legal Defense and Education Fund, noted:

> Whether or not [plaintiff] agreed to pay a fee and in what amount is not decisive. * * * The criterion for the court is not what the parties agreed but what is reasonable. * * *
>
> Congress certainly intended any award under the statute to be reasonable by traditional standards. It did not look, like Lear's jester, to the breath of the unfeed lawyer [sic], but considered that the prevailing litigant should be able to pay the laborer the worth of his hire. [320 F. Supp. at 711.]

In *Hoitt* v. *Vitek*, 495 F.2d 219, 221 (1st Cir. 1974), the court explained:

> None of these legitimate reasons for the exercise of the court's equitable discretion turns on the nature of an individual attorney's normal means of reimbursement. These grounds for fee awards look to the past behavior of the parties and toward encouraging legal representatives in similar situations in the future. If the sole representative of the plaintiffs below had been [New Hampshire Legal Assistance] and the district judge had reasoned, as he did, that the suit merited award under the "private attorney general" theory, we would find it difficult to discern the advancement of any legitimate policy by the denial of attorneys' fees to NHLA. * * *

See also Taylor v. *City of Millington, supra; Quad-City Community News Service, Inc.* v. *Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971); *Doe* v. *Swoap*, Nos. 71-864 RFP, C-69-666 RFP (N.D. Cal., Oct. 26, 1973); *Jones* v. *Seldon's Furniture Warehouse*, 357 F. Supp. 886 (E.D. Va. 1973); *Incarcerated Men of Allen Cy.* v. *Fair, supra.*

As these courts have recognized, awarding attorneys' fees to non-profit litigating organizations on the same basis as they would be awarded to other lawyers simply advances the policy inherent in the "private

attorney general" doctrine—facilitating the vindication of basic rights and strong national interests by increasing the legal resources available for such cases. Indeed, to the extent that there are other disincentives, not strictly pecuniary, which discourage lawyers in private practice from taking such cases (for example, disruption of their regular practice, lack of expertise, or the unpopularity of the cause), preventing an expansion of the activities of these organizations may seriously frustrate the purposes of the doctrine.

Nor can the amount of a fee award logically depend upon whether or not the lawyer involved is a salaried employee of such an organization. Petitioners seem to argue that a lawyer who engages in *pro bono publico* litigation as a part of his regular private practice should recover the reasonable value of his services, but a lawyer who chooses instead to devote full time to such litigation at a reduced overall return should be limited by his salary.[50] Such a distinction is not only illogical and unfair, it is unworkable. For it certainly applies equally to a salaried associate in a private law firm who has undertaken such representation and who, under petitioner's formulation, could only recover the amount of his compensation. Are courts to engage in an economic analysis of the salary, overhead, and expense rates of non-profit litigating organizations and private law firms to determine how to make them whole? The fair, sensible and manageable rule, adopted by the Court below, is to award all attorneys the reasonable value of their services. Indeed, this has been the general practice of the lower courts which have examined the question.[51]

[50] *Brief of Petitioner* at 41.

[51] *See* cases cited at n.49, *supra*.

Finally, petitioner strenuously argues that it is not an appropriate party against whom to impose this fee award. Certainly, the determination of whether attorneys' fees should be awarded is an exercise in equity, and, accordingly, considerations of unfairness to the defendant must be weighed. As the Court noted in *Hall* v. *Cole, supra,* 412 U.S. at 9 n.13, such a consideration "is undoubtedly an important one, [but] it is relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis."

The Court of Appeals considered whether the award, under the particular facts of this case, would be unfair to petitioner.[52] Petitioner initiated the requests for construction permits and vigorously worked for their approval, notwithstanding the Congressional proscriptions.[53] Even after the warning of the preliminary injunction that such permits were illegal, petitioner failed to seek Congressional approval.[54] Petitioner submitted the original construction plans that are widely accepted to have been inadequate.[55] Although the delay undoubtedly cost petitioner a considerable amount of money, it also resulted in refinements, including protection of "the physical integrity of the pipeline itself," [56] which are of substantial long-term benefit to petitioner. Petitioner intervened "to protect its massive interests" and was a "major and real party at interest in this case, actively participating in

[52] *Wilderness Society II, supra,* 495 F.2d at 1036.

[53] *Wilderness Society I, supra,* 479 F.2d at 849-851.

[54] *Id.*

[55] *See* n.42, *supra*.

[56] *Wilderness Society II, supra,* 495 F.2d at 1033 n.3.

the litigation."[57] Petitioner vigorously opposed respondents' effort to restrict the court's initial considerations to the Mineral Leasing Act issues, thus requiring a full briefing of the NEPA issues never reached by the Court of Appeals.[58]

We submit that the Court of Appeals did not abuse its broad discretion in finding that it is reasonable for Alyeska to bear a portion of respondents' attorneys' fees under these factual circumstances.

CONCLUSION

For the foregoing reasons, we urge the Court to affirm the decision of the Court of Appeals and in so doing to affirm the validity of the "private attorney general" doctrine.

Respectfully submitted,

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[57] *Id.* at 1036.

[58] *Id.* at 1035.